86-364

NO. 86-

Supreme Court, U.S.
FILED
SEP 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE APPLICABLE LAW, IN 1982 AND 1984, WAS "CLEARLY ESTABLISHED" SO THAT STATE OFFICIALS COULD REASONABLY BE SAID TO HAVE "KNOWN" THAT AN ADMINISTRATIVE INSPECTION OF A LICENSED COMMERCIAL ESTABLISHMENT, CONDUCTED PURSUANT TO A PERVASIVE REGULATORY SCHEME, WAS CONSTITUTIONALLY OBJECTIONABLE UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II

WHETHER THE COURT BELOW ERRED IN HOLDING THAT PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND HUDSON V. PALMER, 468 U.S. 517 (1984) DID NOT APPLY TO BAR A PROCEDURAL DUE PROCESS CLAIM GROUNDED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN ONE STATE OFFICIAL, IN 1982, AND ANOTHER, TWO YEARS LATER, FAILED TO FOLLOW STATE STATUTORY PROCEDURES GOVERNING LICENSE SUSPENSIONS, WHICH PROVIDED FOR DUE PROCESS, AND AN ADEQUATE POST-DEPRIVATION REMEDY EXISTED.

III

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE APPLICABLE LAW, IN 1982 AND 1984 WAS "CLEARLY ESTABLISHED" SO THAT STATE OFFICIALS COULD REASONABLY BE SAID TO HAVE "KNOWN" THAT A PRE-DEPRIVATION HEARING WAS CONSTITUTIONALLY REQUIRED UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE BEFORE OFFICIALS COULD SUSPEND A COMMERCIAL ESTABLISHMENT LICENSE.

IV

WHETHER THE COURT BELOW ERRED IN HOLDING THAT THE RESPECTIVE SECRETARIES OF THE SOUTH DAKOTA DEPARTMENT OF HEALTH WERE NOT ABSOLUTELY IMMUNE FROM SUIT FOR THEIR DECISIONS, IN 1982 AND 1984, TO SUSPEND A COMMERCIAL ESTABLISHMENT LICENSE.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Richard W. Blair, Douglas E. Kludt, Michael J. Baker, and Mark V. Meierhenry, with the exception of the latter, have been parties to this litigation from the beginning. Petitioners will be referred to by name or collectively as "Petitioners" or "defendants." Respondents, Glenn T. Freeman and Lucy E. Freeman have also been parties to this litigation from the beginning. They will be referred to by name or collectively as "Freemans," or "plaintiffs."

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit appears in the Appendix (A-1-48), and is reported as Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986). The judgment of the Court of Appeals dated and filed June 4, 1986, also appears in the Appendix (A-49-50).

The opinions of the United States District Court for the District of South Dakota, Central Division, denying summary judgment and thereafter granting summary judgment are unreported. They appear in the Appendix, (A-51-61) and (A-62-74), respectively, as does the District Court's Order of Dismissal (A-75-76).

NO. 86-

IN THE
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OCTOBER TERM, 1986

RICHARD W. BLAIR, ET AL.,

Petitioners,

v.

GLENN T. FREEMAN AND LUCY E. FREEMAN,

Respondents.

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 4, 1986.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the Eighth Circuit was entered on June 4, 1986. A Petition for Certiorari was filed

within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. U.S. Const. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing a place to be searched and the person or things to be seized.

2. U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3. S.D. Codified Laws Ann. ch. 34-18, which is set forth in Appendix B.

4. S.D. Codified Laws Ann. §§ 1-26-1 (1982) (1983), 1-26-16 (1966), 1-26-17 (1978), 1-26-17.1 (1978), 1-26-18 (1978), 1-26-18.1 (1976), 1-26-19 (1972), 1-26-19.1 (1972), 1-26-19.2 (1972), 1-26-20 (1966), 1-26-21 (1972), 1-26-22 (1978), 1-26-23 (1966), 1-26-24 (1972), 1-26-25 (1978), 1-26-26 (1975), 1-26-27 (1973), 1-26-28 (1966), 1-26-29 (1966), 1-26-30 (1978), 1-26-30.1 (1975), 1-26-30.2 (1975), 1-26-30.3 (1975), 1-26-30.4 (1982), 1-26-30.5 (1982), 1-26-31 (1979), 1-26-31.1 (1975) (1983), 1-26-31.2 (1977), 1-26-31.3 (1975), 1-26-31.4 (1982), 1-26-32 (1975) 1-26-32.1 (1975), 1-26-32.2 (1982), 1-26-32.3 (1982), 1-26-32.4 (1982), 1-26-33 (1977), 1-26-33.2 (1982), 1-26-33.3 (1982) 1-26-33.4 (1982), 1-26-33.5 (1982), 1-26-33.6 (1975), 1-26-34 (1966), 1-26-35 (1978), 1-26-36 (1978) (1983), 1-26-36.1 (1982), and 1-26-37 (1972) (1983), which are set forth in Appendix C.

5. S.D. Codified Laws Ann. §§ 21-32-15 (1981), 21-32-16 (1981), 21-32-17 (1983) and 21-32-18 (1984) which are set forth in Appendix D.

6. S.D. Admin. R. Chs. 44:02:03 and 44:02:04 (1980), which are set forth in Appendix E.

STATEMENT OF THE CASE

Glenn and Lucy Freeman own a farm in Jackson County, South Dakota and, since 1965, have operated the Belvidere East KOA Kampground (the campground). On July 27, 1982, Michael Baker, an Assistant Program Director for the South Dakota Department of Health (the Department), and another Department employee arrived at the campground and requested permission to inspect pursuant to S.D. Codified Laws Ann. §§ 34-18-24 (1982), 34-18-26 (1972), and S.D. Admin. R. chs. 44:02:03 and 44:02:04 (1980). Glenn Freeman, believing that the South Dakota statutes and regulations did not authorize enforcement of certain national codes, and fearing a biased inspection, refused to allow an inspection without a search warrant. The Department officials thereafter, departed without incident.

The following day, Baker wrote a memorandum to Richard Blair, the Secretary of the Department, recommending that the Freemans' campground license be summarily suspended until the safety and public health conditions of their campground could be determined, but also stated that he (Baker) would perform an inspection of the Freemans' campground under the authorization of a search warrant if Blair deemed this to be the acceptable procedure. Blair then contacted the State Attorney General's Office for advice. Attorney General Mark Meierhenry and Assistant Attorney General Douglas Kludt discussed the Freemans' refusal to allow the Department to inspect the campground. Meierhenry advised Kludt, after reviewing the applicable South Dakota statutes and regulations and discussing the matter with him, to represent the Department and if the Department wished to inspect, "to go do it."

Later that same day, Kludt met with Blair and discussed the Freeman matter. After doing so, Blair telephoned Glenn Freeman and set up an appointment to meet with the Freemans the following morning. During the telephone conversation with Blair, Glenn Freeman indicated that he would not allow an inspection of the Freemans' campground without a search warrant.

On the morning of July 30, 1982, Blair, Baker, and Kludt arrived at the campground and requested permission to conduct an inspection. When Glenn Freeman refused to allow an inspection unless the officials had a warrant, Blair served an order on the Freemans summarily suspending their campground license. On the advice of their attorney that the license suspension was improper, the Freemans continued to operate the campground. Amended license suspension orders were served on the Freemans over the

course of the next several days, setting a hearing date of August 9, 1982.

On August 6, 1982, Glenn Freeman called Kludt to complain about the short amount of time before the scheduled hearing. During the conversation, Glenn Freeman was advised that the Department would be amenable to rescheduling the hearing for a more reasonable time. Later in the conversation, Glenn Freeman consented to an inspection of his campground after receiving assurances from Kludt that he would get an "unbiased" inspector.

Four days after this conversation, Baker and another Department employee conducted, with the Freemans' consent, an inspection of their campground.

In March, 1983, the Freemans filed this suit alleging, inter alia that their rights under the Fourth and Fourteenth Amendments were violated by State officials. The

Freemans named as defendants the State of South Dakota, the Department, Governor William J. Janklow, Meierhenry, Blair, Kludt and Baker. The State of South Dakota and the Department voluntarily were dismissed as parties and the District Court dismissed Janklow and Meierhenry by motion.[1] The remaining defendants moved for summary judgment, contending that no search warrant was required prior to inspection and that the summary suspension of the campground license was proper. The district court held that summary judgment was inappropriate because "plaintiffs were well within their Fourth Amendment rights" to require a search warrant and that the due process claim arising from the summary suspension of the Freemans'

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[1]The District Court subsequently reinstated Meierhenry as a party.

license therefore survived. Freeman v. Blair, No. 83-3026, slip op. at 6-7 (D.S.D. Oct. 31, 1984) Appendix (A-59-61).

On August 29, 1984, two employees of the Department contacted the Freemans at their campground and requested permission to conduct another inspection. Glenn Freeman denied Department employees permission to inspect and the officials departed the Freemans' campground.

In a letter written the next day, Blair's successor, Lawrence Massa, requested the Freemans to set a convenient time for inspection. Glenn Freeman responded by letter, denying the Department access to the Freemans' campground without a search warrant. Subsequently, Massa, summarily suspended the Freemans' campground license on the ground that the "public health, safety and welfare imperatively required immediate action" and scheduled a hearing for

September 18, 1984, to review the circumstances of the summary suspension.

Eventually, after a postponement by mutual agreement of the parties, a hearing was held to a hearing examiner on October 3, 1984. The hearing examiner concluded that the South Dakota regulatory scheme was insufficient to support warrantless inspections and ordered the Freemans' campground license be reinstated.

On March 22, 1985, defendants again moved for summary judgment, claiming absolute and/or qualified immunity. The district court granted defendants' motion and dismissed the Freemans' complaint with prejudice. In do so, the court held that the defendants were entitled to qualified immunity and that Blair and Massa were entitled to absolute immunity from suit for their actions. Freeman v. Blair,

No. 83-3026, slip op. at 5-8 (D.S.D. April 25, 1985) Appendix (A-66-73).

The Eighth Circuit Court of Appeals reversed, concluding that neither qualified nor absolute immunity was applicable under the circumstances. Freeman v. Blair, 793 F.2d 166 (8th Cir. 1986) Appendix (A-13-46).

REASONS FOR GRANTING THE WRIT

I

QUALIFIED IMMUNITY--FOURTH AMENDMENT ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

It is settled law that government officials performing discretionary functions are entitled to qualified ("good faith") immunity from suit as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow

v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct. 2806, 2818 (1985); Davis v. Scherer, ___ U.S. ___, 104 S.Ct. 3012, 3018-3019 (1984). Whether an official is entitled to qualified immunity depends in turn upon whether the applicable law was "clearly established" at the time of the alleged misconduct. Harlow v. Fitzgerald, 457 U.S. at 818.

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbid conduct not previously identified as unlawful . . . if the law was clearly established, immunity defense ordinarily should fail, since a reasonable competent public official should know the law governing his conduct.

Id. at 818-819.

The Eighth Circuit panel held that the applicable law in 1982 and 1984 was "clearly established" so that the Petitioners could

reasonably be said to have "known" that they were not entitled to inspect the Freemans' campground under the State's regulatory scheme without a search warrant. Freeman v. Blair, 793 F.2d at 174-176. In so holding, the panel observed that under Donovan v. Dewey, 452 U.S. 594 (1981), even if the commercial campground industry in South Dakota was "pervasively regulated", see United States v. Biswell, 406 U.S. 311 (1972), state officials were nonetheless prohibited by the Constitution from conducting warrantless inspections of the Freemans' campground because the State's regulatory scheme was not sufficiently defined to assure "certainty and regularity" and qualify as a "constitutionally adequate substitute for a warrant." Freeman v. Blair, 793 F.2d 175, quoting Donovan v. Dewey, 452 U.S. at 603. The panel interpreted Donovan v. Dewey, supra, to mean that a warrantless

inspection of a "pervasively regulated industry" was permissible only when it was conducted pursuant to a detailed inspection scheme that could act as a surrogate for a warrant. Such an interpretation, however, flies in the face of this Court's pronouncements in United States v. Biswell, supra.

In Biswell, a pawn shop operator claimed that the warrantless inspection of his business premises, although authorized by Section 923(g) of the Gun Control Act of 1968 (18 U.S.C. § 921, et seq.), violated his Fourth Amendment rights. This Court, however, upheld the inspection, despite the fact that § 923(g) failed to define the frequency or scope of inspection, and in addition, failed to provide any means by which an establishment owner's Fourth Amendment interests could be accommodated. See Donovan v. Dewey, 452 U.S. at 604-605.

Under the panel's holding in Freeman, the warrantless inspection at issue in Biswell would have been invalid since § 923(g) did not define either the frequency or scope of an inspection or provide a mechanism for accommodating Fourth Amendment interests, and therefore comply with the requirements set forth in Donovan v. Dewey, supra.[2] To say, as the panel does, that the

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[2]Interestingly, the Eighth Circuit, in United States v. Jamieson-McKames Pharmaceuticals, 651 F.2d 532 (8th Cir.) cert. denied, 455 U.S. 1016 (1981), upheld the warrantless inspection of a pharmacy conducted pursuant to § 704 of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 374). In doing so, the Court found that the inspection fit within the Colonnade-Biswell exception to the warrant requirement despite the fact that § 704 did not limit the frequency or scope of the inspection or provide for a means by which an establishment owner could accommodate any special Fourth Amendment interests he might have. Significantly, the Jamieson-McKames Pharmaceuticals decision, although originally handed down approximately one month before

(Footnote Continued)

applicable law in 1982 and 1984 was "clearly established" and that it was unreasonable for the Petitioners to rely on Biswell for a basis for their warrantless inspections is both erroneous and unjustifiable and demands correction by this Court through a writ of certiorari.

B. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eighth Circuit panel's decision herein raises significant and reoccurring problems for state officials in the area of administrative inspections of licensed commercial establishments. This is

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(Footnote Continued)
the Dewey decision, was amended some seven weeks after Dewey was decided and specific reference to Dewey was included in the amended decision of the Court. See 651 F.2d at 539, n.10.

particularly the case since at least eleven other states have inspection schemes pertaining to campgrounds which, in substance, mirror the one found in South Dakota.[3]

More importantly, the panel's decision represents an erroneous and overly restrictive view of whether the applicable law concerning warrantless administrative inspections was, in 1982 and 1984, "clearly established." The following factors militate

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[3]Florida, Fla.Stat. § 573.052 (1984); Illinois, Ill.Rev.Stat. ch. 111½, §§ 768-772 (1985); Kentucky, 902 Ky. Admin. Regs. 15:020:15 (1975); Maine, Me. Rev. Stat. Ann. Tit. 22, § 2497 (1979); Montana, Mont. Code Ann. § 50-52-301 and 302 (1983), Mont. Admin. R. 16.10.704 (1982); Nebraska, Neb. Rev. Stat. § 71-3103 (1959); North Dakota, N.D. Cent. Code § 23-10-04 (1977); Ohio, Ohio Admin. Code § 3701-25-53 (1984); Oregon, O.R.S. § 446.335 (1981); Wisconsin, Wis. Admin. Code HSS 178.17 (1985); Wyoming, Mobile Home Park & Campground Regulations § 8 (1982).

against a finding that the applicable law was "clearly established" and make the panel's holding highly suspect:

> 1. Warrantless administrative searches/inspections of commercial property, conducted pursuant to a regulatory scheme, had, in 1982 and 1984, and have, since then, been upheld on numerous occasions in a wide variety of contexts, many involving inspections for potential health and safety hazards such as was the purpose for the inspections attempts here.[4]
>
> 2. Warrantless administrative inspections of licensed commercial establishments, made under a regulatory scheme, have, since 1967, been constitutionally resolved on a case-by-case basis under the Fourth Amendment standard of unreasonableness" (i.e., by balancing the State's interests with that of the establishment). See v. City of Seattle, 387 U.S. 541, 546 (1967); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77; Marshall v. Barlow's, Inc., 436 U.S. 307, 321 (1978).

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[4]A list of citations appears in the Appendix F.

3. Warrantless administrative inspections of licensed commercial campgrounds in South Dakota were, in 1982 and 1984, specifically authorized by a presumptively valid regulatory scheme that had never been constitutionally tested in any state or federal court.

4. At the time, this Court had, for the most part, been particularly sensitive to the Fourth Amendment's broad statement of "reasonableness" where authorizing statutes permitted the challenged inspection or search. See Barlow's, 436 U.S. at 335, n.7 (Stevens, J., dissenting); Almeida-Sanchez v. United States, 413 U.S. 266, 290 (1973) (White, J., dissenting); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

5. While a commercially licensed business at the time was unquestionably entitled to Fourth Amendment protection, nonetheless, such a business, by its nature and voluntary existence, could open itself to intrusions that would not be permissible in a purely private context. See G.N. Leasing Corporation v. United States, 429 U.S. 338, 353-354 (1977); see also, Colonnade, supra; Biswell, supra.

6. At the time, there could be no reasonable expectation of privacy in public areas of a commercial establishment such as a campground

subject to inspection. See Barlow's, 436 U.S. at 315; Donovan v. Lone Steer, 464 U.S. 408 (1984).

7. In the context of campgrounds, the State had, at the time, a strong and important interest in protecting, via inspection, the health and safety of those members of the general public using campgrounds. See Biswell, 406 U.S. at 315; Dewey, 452 U.S. at 601.

8. The South Dakota Legislature and the South Dakota Department of Health, by enacting S.D. Codified Laws Ann. §§ 34-18-24 (1982), 34-18-26 (1972), S.D. Admin.R. chs. 44:02:03 and 44:02:04 (1980), respectively, determined that the promotion of health and safety in campgrounds, was an urgent State interest requiring regulation and supervision, and further, that warrantless inspections were crucial to the accomplishment of these health and safety goals. See Biswell, 406 U.S. at 315-317; Barlow's, 436 U.S. at 329 and 333 (Stevens, J., dissenting).

9. The requirement of a search warrant as a predicate for conducting an administrative inspection would, at the time, have undermined the efficiency and effective enforcement of the South Dakota regulatory scheme. See Biswell, 406 U.S. at 315-316; Barlow's, 436 U.S. at 329-330

(Stevens, J., dissenting); Dewey, 452 U.S. at 602-603.

10. The South Dakota regulatory scheme was, at the time, specifically tailored to protect health and safety concerns unique to campground establishments, see S.D. Admin.R. ch. 44:02:03 (1980). See Dewey, 452 U.S. at 603.

11. The standards with which a South Dakota campground owner at the time was required to comply with were all specifically set forth in S.D. Admin.R. ch. 44:02:03 (1980), a copy of which was, and still is, furnished to all campground owners free of charge. See Dewey, 452 U.S. at 603-604.

12. In most campground inspection situations in South Dakota, at the time, there was little or no information available to authorities prior to inspection that would justify a warrant.

13. At the time, potential health and safety hazards from which the public must be protected could not be detected without entering the campground establishment, and for this reason, routine inspections were imperative so that these hazards would not escape attention. Compare, Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861, on remand, 35 Colorado App. 207, 534 P.2d 796, aff'd, 191 Colo. 455, 553 P.2d 811 (1974).

14. The OSHA regulatory scheme considered in Barlow's differed significantly from the South Dakota campground regulatory scheme at the time in the following respects:

a. Unlike the OSHA scheme which authorized the inspection of practically all of American industry, the South Dakota scheme at the time, was specifically limited to inspections of lodging, food service and campground establishments. See Dewey, 452 U.S. at 603.

b. In contrast to the OSHA scheme where the class sought to be protected was made up of employees who were in the work place itself and free to report violations at any time, the protected class under the South Dakota scheme at the time, was the general consuming public (i.e., tourists), who had no way of learning of violations short of illness or injury from using campground facilities containing health and safety hazards.

c. In Barlow's, the secretary's argument that

> a warrant requirement would impede enforcement was inconsistent with the fact that OSHA regulations promulgated by the secretary himself provided for obtaining warrants, even though the statute did not require it. Under the South Dakota scheme, however, there was, at the time, no similar regulation and thus nothing that was inconsistent with the stated needs of enforcement.

It follows from the foregoing, that the applicable law, as the district court held, was not so "clearly established" that Petitioners could reasonably be said to have been "plainly incompetent" or to have acted in "knowing violation" of the law. See Malley v. Briggs, ___ U.S. ___, 106 S.Ct. 1092, 1096-1097 (1986). Accordingly, review is necessary to correct the panel's decision below.

C. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE

DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND STATE COURTS OF LAST RESORT ON THE SAME MATTER.

The Petitioners submit that the instant case is in conflict with the following decisions:

1. Lovgren v. Byrne, 787 F.2d 857 (3d Cir. 1986)

2. Peterman v. Coleman, 764 F.2d 1416 (11th Cir. 1985)

3. Rush v. Obledo, 756 F.2d 713 (9th Cir. 1985)

4. United States v. Kaiyo Maru No. 53, 699 F.2d 989 (9th Cir. 1983)

5. Wayne Cusimano, Inc. v. Block, 692 F.2d 1025 (5th Cir. 1982)

6. United States v. Gordon, 655 F.2d 478 (2d Cir. 1981)

7. United States v. Raub, 6337 F.2d 1205 (9th Cir.), cert. denied, 449 U.S. 922 (1980)

8. Frey v. Panza, 621 F.2d 596 (3d (Cir.), cert. denied, 449 U.S. 1035 (1980)

9. Pollard v. Cockrell, 578 F.2d 1002 (5th Cir. 1978)

10. United States ex rel. Terraciano v. Montange, 493 F.2d 682 (2d Cir.), cert. denied, 419 U.S. 875 (1974)

11. Pullin v. Louisiana State Racing Com'n., 4767 So.2d 683 (La. 1985), on rehg, 484 So.2d 105 (1986)

12. Glenwood TV, Inc. v. Ratner, 103 A.D.2d 322, 480 N.Y.2d 98 (1984), aff'd, 65 N.Y.2d 642 491 N.Y.S.2d 620, cert. denied, ___ U.S. ___, 106 S.Ct. 241 (1985).

13. Tallman v. Department of Natural Resources, 421 Mich. 585, 365 N.W.2d 724 (1984)

14. Moore v. State, 442 So.2d 215 (Fla. 1983)

15. State v. Kirkland, 655 S.W.2d 140 (Tenn. 1983)

16. In re Martin, 90 N.J. 295, 447 A.2d 1290 (1982)

17. Marcowitz v. Department of Public Health, 106 Ill. App.3d 422, 435 N.E.2d 1291 (1982)

18. State v. Tindell, 272 Ind. 479, 399 N.E.2d 746 (1980)

19. State v. Barnett, 389 So.2d 352 (La. 1980)

20. People V. Firstenberg, 92 Cal. App.3d 570, 155 Cal.Rptr. 80 (2d Dist. 1979), cert. denied, 444 U.S. 1012 (1980)

21. Hosto v. Brickell, 265 Ark. 147, 577 S.W.2d 401 (1979)

22. City of Indianapolis v. Wright, 267 Ind. 471, 371 N.E.2d 1298 (1978)

D. OTHER REASONS

Recently, this Court accepted jurisdiction in People v. Krull, No. 85-608 (certiorari granted March 24, 1986) (opinion below: Illinois v. Krull, 107 Ill.2d 107, 481 N.E.2d 703 (1985)) and in Anderson v. Creighton, No. 85-5020 (certiorari granted June 30, 1986) (opinion below: Anderson v. Creighton, 766 F.2d 1269 (8th Cir. 1985)) and docketed the cases of Lewis v. McMasters, No. 85-2005 (appeal filed March 24, 1986) (opinion below: (9th Cir. October 22, 1985), unpublished) and New York v. Burger, No. 86-80 (petition for certiorari filed July 18, 1986) (opinion below: People v.

Burger, 67 N.Y.2d 338, 502 N.Y.S.2d 702 (1986)). A review of the issues presented in these cases reveals that this Court could, in Krull, Creighton, McMasters or Burger decide the qualified immunity--Fourth Amendment issue raised herein. The Petitioners, as an alternative reason for granting the writ in the instant case, respectfully request that the Court do so.

II

PARRATT/HUDSON--DUE PROCESS ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

The Freemans' Fourteenth Amendment claim revolves around the action taken to suspend their campground licenses in 1982 and 1984. According to the Freemans, Petitioners' failure to afford them notice and an opportunity to be heard prior to summarily suspending their campground licenses deprived

them of due process of law. The Eighth Circuit panel held that the Petitioners' acts were not "random and unauthorized" and refused to apply Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, 468 U.S. 517 (1984) to the Freemans' due process claim. The panel reasoned that because the Petitioners' were "senior-level officials" they knew and were responsible for the decisions to summarily suspend the Freemans' campground licenses. Freeman v. Blair, 793 F.2d at 177. The panel's opinion, however, conflicts with this Court's pronouncements in Parratt and Hudson.

In Parratt, a state prison inmate was deprived of a twenty-three dollar and fifty cent ($23.50) hobby kit that he had ordered because a prison official had negligently mishandled prison mail. This Court held that where deprivations of property occur as a result of the unauthorized failure of agents

of the state to follow established state procedure and it is therefore impossible for the state to provide a meaningful pre-deprivation hearing, due process is satisfied by the existence of an adequate post-deprivation state remedy. Parratt, 451 U.S. at 541. The Court, later, in Hudson, reaffirmed the Parratt holding and extended it to include an intentional deprivation of property by state employees acting under color of state law.

The Freemans, in the instant case, did not allege that the State procedures governing summary suspensions were inadequate or served to deprive them of a protected interest. Rather, they alleged that the Petitioners applied these procedures in an unauthorized way (i.e., arbitrarily and capriciously) to deprive them of their due process rights. Stated otherwise, the alleged deprivation, according to the

Freemans, did not occur as a result of some state procedure, but as a result of Petitioners' failure to comply with the statutory procedures dealing with the summary suspension of campground licenses contained in S.D. Codified Laws Ann. §§ 34-18-27 (1972) and S.D. Codified Laws Ann. § 1-26-29 (1966).

Significantly, the Freemans had available to them, at the time, a means of redress for their alleged deprivations which satisfied due process and entitled them to be made whole for any injuries they might have suffered through the negligence of Petitioners. This means, of course, was through S.D. Codified Laws Ann. ch. 21-32 which, at all times relevant here, permitted the Freemans to sue the Petitioners in common-law tort and recover damages to the extent of liability insurance coverage ($1 million). See Norgeot v. State, 334 N.W.2d 501 (S.D. 1983); Arndt v. Hannum

Trucking, 324 N.W.2d 680 (S.D. 1981). By making this remedy available to the Freemans, the State did all that due process in a case such as this required. See Parratt v. Taylor, supra; Hudson v. Palmer, supra; compare Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Whether some or all of the Petitioners were "senior-level officials" and as such could have provided the Freemans with a pre-deprivation hearing, does not make Parratt/Hudson inapplicable, since from the point of view of the State, as opposed to the state officials themselves, the summary suspensions in 1982 and 1984 were "random and unauthorized acts." Hudson v. Palmer 468 U.S. at ___, 104 S.Ct. at 3204; see also, Holloway v. Walker, 790 F.2d 1170, 1173-1174 (5th Cir. 1986) (on petition for rehearing). Indeed, the State of South Dakota had no way of knowing that the Departments' secretaries,

in 1982 and 1984, would fail to follow, either in form or substance, the established state procedures before summarily suspending the Freemans' campground licenses and accordingly cannot be said to have been in a position to have provided for pre-deprivation due process. Id.

B. THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL ON THE SAME MATTER.

In addition, the Eighth Circuit panel's decision, conflicts with the following decisions of other federal courts of appeal:

1. Holloway v. Walker, supra

2. Yats v. Jamison, 782 F.2d 1182 (4th Cir. 1986)

3. Gunz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985)

4. Wilson v. Beebe, 770 F.2d 584 (6th Cir. 1985) (en banc)

5. Cohen v. City of Philadelphia, 736 F.2d 81 (3d Cir. 1984)

6. Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983)

7. Albery v. Reddig, 718 F.2d 245 (7th Cir. 1983).

C. UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eighth Circuit's panel decision raises a significant and reoccurring question concerning the applicability of Parratt, Logan, and Hudson, which federal courts have struggled with for years. See R.A. Smolla, The Displacement of Federal Due Process by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co., U.Ill.F., 831 (1982). Specifically, the decision brings to the forefront the following unanswered question:

> What is a "random and unauthorized act?"

This Court has never defined what constitutes "random and unauthorized" conduct, as compared with conduct pursuant to and "established state procedure," and as a result, there has been a great deal of confusion and inconsistency among federal courts. Id.; Note, Unauthorized Conduct of State Officials Under the Fourteenth Amendment: Hudson v. Palmer and the Resurrection of Dead Doctrine, 85 Colum. L. Rev. 837 (1985). The time has come, therefore, for this Court to definitively resolve the issue.

III

QUALIFIED IMMUNITY--DUE PROCESS ISSUE

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The Eighth Circuit panel held that the Fourteenth Amendment due process requirement of a pre-deprivation hearing in circumstances

such as existed here, was "clearly established" at the time and rejected Petitioners' qualified ("good faith") immunity defense. A close scrutiny of the applicable decisions of this Court, however, reveals that the state of the case law was not "clearly established" in 1982 and 1984, where, as here, State officials imposed interim license suspensions, pending prompt administrative hearings that would determine the issues at hand.[5] See Cleveland Board of Education v. Loudermill, ___ U.S. ___, 105 S.Ct. 1487 (1985); Hudson v. Palmer, supra; Parratt v. Taylor, supra; Barry v. Barchi,

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[5]It is undisputed that the Freemans, within several days of the 1982 and 1984 license suspensions, were given notice and an opportunity to challenge the suspensions in a contested case hearing as required by S.D. Codified Laws Ann. §§ 34-18-27 (1972) and 1-26-29 (1966), and that in 1984, a contested case hearing was held.

443 U.S. 55, 1979; Mackey v. Montrym, 443 U.S. 1 (1979); Dixon v. Love, 431 U.S. 105 (1977); see generally Anno., The Supreme Court's Views As To The Propriety Under Federal Constitution's Due Process Guarantees Of Summary Administrative Deprivation Of Property Interest, 69 L.Ed.2d 1044 (Supp. 1985). Instead, the case law at the time established that due process was a flexible concept, See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979), Morrissey v. Brewer, 408 U.S. 471, 481 (1972), and turned on a review of each individual case and a balancing of various factors to ascertain what process was due. Loudermill, supra; Mathews v. Eldridge, 424 U.S. 319 (1976); see generally, Rubin, Due Process and the Administrative State, 72 Cal. L.Rev. 1044 (1984). Accordingly, review is mandated not only to settle the conflict which exists between the panel's opinion and

this Court's decisions on the subject, but also, to rectify an erroneous view on the part of the panel as to the applicable law at the time.

IV

ABSOLUTE IMMUNITY ISSUE

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The federal appeals court panel, distinguishing Butz v. Economou, 438 U.S. 478 (1978), refused to extend absolute immunity to Blair and Massa for their decisions, in 1982 and 1984 respectively, to summarily suspend the Freemans' campground licenses. In doing so, the panel was "unable to discern how extending absolute to situations such as [the one at hand] would promote the underlying purposes of immunity" and could not perceive "how the absence of absolute immunity here would impede an executive

branch official's vigorous exercise of his office for proper purposes in the future or how it would be unfair to subject to liability an official who knew or reasonably should have known that his initial actions, from which the administrative proceedings flowed, were clearly improper." Freeman v. Blair, 793 F.2d at 172.

This Court has recognized that executive agency officials, in certain circumstances, are entitled to absolute immunity. Butz, supra. In Butz, this Court held that executive agency officials who are responsible for the decision to initiate an administrative proceeding were entitled to absolute immunity from liability. Id., 438 U.S. at 515-516. Justice White, writing for the majority, reasoned that a decision to initiate administrative proceedings against an individual is very much like the prosecutor's decision to initiate or move

forward in a criminal prosecution. Id., at 515.

Under the Butz decision, Blair and Massa were clearly entitled to absolute immunity from suit for their actions involving the suspension of the Freemans' campground licenses. First, Blair and Massa, in deciding to initiate summary suspension proceedings against the Freemans, were performing functions "analogous" to those of a prosecutor bringing a criminal prosecution. Id., at 515-516; see also, Mitchell v. Forsyth, ___ U.S. ___, 105 S.Ct. 2806 (1985); Imbler v. Pachtman, 424 U.S. 409 (1976). Their decision to institute such proceedings, just as a prosecutor's decision to institute criminal proceedings, was discretionary in nature.

Second, and contrary to the panel's perceptions, there was, at the time, a serious danger that the decision to summarily

suspend the Freemans' campground licenses would provoke a retaliatory response. The record plainly shows that the Freemans, and more particularly, Glenn Freeman, had a long-standing animosity against the Department and the State of South Dakota in general. This Court can take judicial notice, pursuant to Rule 201 of the Federal Rules of Civil Procedure, that Glenn Freeman has previously filed suit, counterclaimed or been a party to a suit against the State, its subdivisions, State officials and private business.[6] Blair and Massa, at the time,

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[6]For example, the Freemans, on August 1, 1985, filed an action against the Department and Massa alleging that certain statutes and regulations pertaining to campgrounds were invalid. Currently, the suit remains pending in the State Circuit Court. See Freeman v. Department of Health, et al., Jackson County Civ. #85-18. See also, South Dakota Department of Transportation v. Freeman, 378 N.W.2d 241 (S.D. 1985) (opposing the State

(Footnote Continued)

were therefore subject to an obvious risk of retaliation through vexatious litigation from the angry and vengeance-seeking Glenn Freeman over his campground establishment. Butz, supra, 438 U.S. at 515; Mitchell v. Forsyth, ___ U.S. at ___, 105 S.Ct. at 2813; Nixon V. Fitzgerald, 457 U.S. 731, 751-753 & n.32-33 (1982); Gray v. Bell, 712 F.2d 490, 497-498 & n.17, (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984). Without complete immunity, the threat of litigation from the Freemans, or at least from Glenn Freeman, would distort the Departments' secretary's discretion and effect the fearless and independent performance of his duties. Id.

(Footnote Continued)
Department of Transportation's attempt to acquire highway billboards by condemnation); Terminal Grain Corporation v. Freeman, 270 N.W.2d 806 (S.D. 1978) (counterclaim against grain company for libel and slander and malicious prosecution).

Third, the Freemans have no proper ground to complain about affording Blair and Massa absolute immunity because they were provided with a sufficient means of checking agency zeal. See Butz, supra at 438 U.S. at 516; Nixon v. Fitzgerald, 457 U.S. at 757-758; Mitchell, supra, ___ U.S. at ___, 105 S.Ct. at 2814; Gray v. Bell, 712 F.2d at 498 & n.18. The record plainly shows that in both 1982 and 1984, the Freemans were given an opportunity to test the legality of the inspection and suspension acts, if they so desired, in a contested case hearing, and to appeal the decision to the circuit court and the State Supreme Court.

Finally, since, as demonstrated, the applicable law at the time was not "clearly established" neither Blair nor Massa could reasonably be said to have "known" that their initial actions, from which the administrative proceedings flowed, were

improper. Their decisions to suspend the Freemans' campground licenses clearly fell within the type of action rendered immune by Butz, and hence, completely protected them from suit in this case. By holding to the contrary, the Eighth Circuit has placed itself in conflict with this Court's pronouncements in Butz and of other Supreme Court cases dealing with the subject. Accordingly, the writ of certiorari should be granted.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Dated this 2nd day of September 1986.

Respectfully submitted,

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